No. 23

In the Supreme Court of the United States

OCTOBER TERM, 1957

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the district court (R. 200–237) is reported at 141 F. Supp. 168.

JURISDICTION

The judgment of the district court was entered on June 5, 1956 (R. 256–257), and notice of appeal was filed on July 31, 1956 (R. 257). Probable jurisdiction was noted on December 3, 1956 (R. 987). The jurisdiction of this Court rests on 28 U. S. C. 1253 and 2101 (b).

QUESTION PRESENTED

Whether procedurally and substantively the district court acted correctly in declaring unconstitutional, and in enjoining the enforcement of, a California law authorizing the California Public Utilities Commission to limit, and impose conditions on, special arrangements between common carriers and the United States to transport property for the United States at reduced rates between points within the state.

STATUTES AND REGULATIONS INVOLVED

Section 530 of the California Public Utilities Code, as amended, California Statutes 1955, Ch. 1966, par. 1, provides in pertinent part:

> Every common carrier subject to the provisions of this part may transport, free or at reduced rates:
>
> (a) Persons for the United States, * * *.
>
> * * * * *.
>
> The commission may permit common carriers to transport property at reduced rates for the United States, state, county, or municipal governments, to such extent and subject to such conditions as it may consider just and reasonable. Nothing herein shall prevent any common carrier subject to the provisions of this part from transporting property for the United States, state, county, or municipal governments, at reduced rates no lower than rates which lawfully may be assessed and charged by any other such common carrier or by highway permit carriers as defined in the Highway Carriers' Act.

Pertinent sections from the Armed Services Procurement provisions, 70A Stat. 127 (10 U. S. C. 2301,

et seq.); the Johnson Act, 62 Stat. 932 (28 U. S. C. 1342); the Interstate Commerce Act, as amended, 58 Stat. 751 (49 U. S. C. 22); the Transportation Act of 1940, 54 Stat. 954, as amended; various Defense Department, Army, Navy, and Air Force Regulations; and the California Public Utilities Code are set forth in the Appendix, *infra*, pp. 62–77.

STATEMENT

This is an appeal by the Public Utilities Commission of California from the judgment (R. 256–257) of a three-judge district court which found that Section 530 of the Public Utilities Code of California, as applied to the United States, contravened the Federal Constitution, and which permanently enjoined the Commission from interfering with the making of special arrangements between the United States and carriers in the state with respect to transportation of property of the United States.

For many years, the United States has followed the practice of negotiating special agreements with carriers as to the rates governing transportation of the Government's property (R. 244). While some Government property has moved at ordinary commercial rates, its property, particularly that of the armed forces, has usually been transported at negotiated rates substantially equal to or lower than those applicable to commercial shipments (R. 377–379, 402, 597–598, 605). Section 22 of the Interstate Commerce Act, 49 U. S. C. 22, exempts transportation for the United States from the rate provisions of that Act, and Section 530 of the Public Utilities Code of Cali-

fornia, prior to its amendment in July, 1955, sanctioned the practice as to intrastate shipments in California (R. 244–245).

Section 530, before the 1955 amendment, provided that every common carrier "may transport, free or at reduced rates, * * * property for the United States * * *."[1] The amendment eliminated authority to transport property of the United States free or at reduced rates, and substituted the provision that the Commission "may permit" common carriers to transport property for the United States and the state at reduced rates "to such extent and subject to such conditions as it may consider just and reasonable." Since the Code requires every common carrier to file its tariff schedules with the Commission and prohibited any deviation from filed rates (Secs. 486, 494), under the amended section, except as authorized by the Commission, common carriers can no longer transport property of the United States at rates below those in their filed tariffs.[2]

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[1] The same right was given with respect to transportation for State, county or municipal governments. The section applies to common carriers subject to the provisions of part 1 of the Code. These constitute common carriers by land, water, and motor (Pub. Util. Code, Sec. 211).

[2] The section as amended further provided that the amendment shall not prevent a common carrier from transporting property of the United States "at reduced rates no lower than rates which lawfully may be assessed and charged * * * by highway permit carriers * * *." (Under Section 3515 of the Code, a "highway permit carrier" is a carrier by motor other than a common carrier or a petroleum irregular route carrier.) Under authority given the Commission to establish minimum rates

In this situation, the United States instituted the present proceeding. The complaint asked the district court to declare Section 530 unconstitutional insofar as it prohibits carriers from transporting Government property at rates other than those approved by the Commission, and to grant injunctive relief (R. 9). The United States also sought and was granted a temporary restraining order barring any action by the Commission which would interfere with the United States in the making of special arrangements with carriers as to rates for the transportation of Government property (R. 9, 11–12).

The Commission filed a motion to dismiss the Government's complaint (R. 15–16). After denial of this motion (R. 198), it filed an answer (R. 199) and the

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for these permit carriers (Sec. 3662), it had from time to time issued minimum rate orders, and had incorporated in the minimum rate tariff applicable to all commodities, other than those expressly excepted, a provision authorizing deviation from the named minimum rates in connection with "transportation of property for the armed forces of the United States" (App. Br. 8–9; Appendix to App. Br. 39). This deviation authorization, while it remained in effect, would allow common carriers to reduce their rates on certain property transported for the armed forces of the United States to the level of the rate at which any permit carrier transported property for these forces. In order to avoid this automatic exemption, after passage of the bill to amend Section 530, the Commission, on August 16, 1955, entered an order cancelling the deviation authorization for permit carriers as of the date the amendment to Section 530 became effective, September 7, 1955, but on the request of the Department of Defense, on September 6, 1955, it postponed the cancellation to December 5, 1955 (App. Br. 10, 14–17). After the district court restrained the enforcement of Section 530 (see text, this page), the Commission continued the postponement of cancellation until disposition of this case (R. 102–104).

ase went to trial. The Government's twelve wit-
esses were, in the main, officers charged with pro-
urement of transportation for Government property
or the armed services. The Government's evidence
ealt with the effect on transportation of supplies and
aterials for the armed forces of the United States,
nd the additional burdens which would be cast on
he Government, if the rates for such transportation
etween points in California) were subject to the
risdiction and control of the Commission. The
ommission called three witnesses who denied that
he law would result in such effect and burden.

The district court rendered an opinion in which it
oncluded that Section 530 contravenes the provisions
the Federal Constitution (R. 237). Subsequently
filed detailed findings of fact (R. 240–253), and con-
usions of law (R. 253–256), and entered a judgment
hich permanently enjoined appellant from taking
ny action "which would interfere with the United
tates and the various carriers in the State of Cali-
rnia from entering into special arrangements with
spect to rates for the transportation of property of
e United States" (R. 257).

The following summarizes the principal facts found
the district court:

Because of the 152 military installations and the
reraft and missile industries in California, there is a
ry large volume of military traffic between points in
at state (Fdg. 11, R. 241). The pattern of military
affic differs from commercial traffic in several re-
ects; thousands of military items have no counter-
art in commercial trade commodities; it is often

necessary to ship a great many diverse items in one shipment; the necessity for urgent shipment may arise on very short notice; because of the location of military installations, shipments are often made to points which have no relation to the normal flow of trade; and many military items are of highly secret nature and at times must be secretly and circuitously routed for purposes of security (Fdgs. III–V, R. 242–243). The Government has met these peculiar requirements of its transportation problem by entering into special arrangements with the carriers (Fdg. VIII, R. 244).

Three types of rates are involved: the class rate, the commodity or commercial rate, and the "freight all kinds" rate. A common carrier is required to publish a rate to cover the shipment of every known item between every conceivable point; this rate is the class or "paper rate" (Fdg. XII, R. 246). Very little commercial traffic moves at the class rate (*ibid.*) The large commercial shipper usually negotiates, subject to approval of the appropriate regulatory agency, rates with the carriers (known as "commercial rates"), which are especially adapted to the volume and nature of the commerce involved (*ibid.*). Finally, because of the peculiar nature of military operations, where hundreds of diverse items for the supply of a division or a vessel may be needed at one place at one time, the Government often negotiates a single rate for an entire movement (the "freight all kinds" rate) (Fdg. XIV, R. 247).

Were the amendment to Section 530 to become effective, serious interference with federal transportation functions would result. Because of the nature,

origin and destination of many military items, no commercial rate exists for much of the military traffic, and some shipments would therefore be delayed for Commission action unless shipped under established class rates, requiring the Government to pay 50% to 100% more than would the commercial shipper (Fdg. XIII, R. 247). The "freight all kinds" rate would be unavailable to the Government, and it would therefore be necessary for its shipping personnel to classify and segregate hundreds of items for the most economical shipment (Fdg. XIV, R. 247–248). And (although its counsel stipulated that for the present the authority would not be exercised) the Commission, in order to establish appropriate rates for movement of the Government's property, would have the authority to require information of a secret nature. Further, general information as to military movements (the particular items, their origin and destination, and the amounts of their movement) would have to be disclosed to the State Commission, thus possibly making available to enemy agents the pattern of this country's military movements (Fdg. XVIII, R. 249). The delays, increased administrative burden and expense, and danger to security that would result from the application of Section 530, as amended, would be multiplied many times in time of war (Fdg. XXIII, R. 252).

The court's major conclusion of law was that the Commission's regulation of the rates for the intrastate shipment of military material would so drastically interfere with the officers of the United States in discharging their responsibility of supplying the

defense establishments, and would so endanger the security of the United States, as to contravene the provisions of the Constitution vesting the obligation to provide for the national defense in the Federal Government (R. 254).

SUMMARY OF ARGUMENT

I

A. The complaint states "a case of actual controversy" within the meaning of the Declaratory Judgment Act (28 U. S. C. 2201). The United States asserts the constitutional right to obtain, free from state interference, intrastate transportation of its property pursuant to agreement with common carriers. Section 530 of the California Public Utilities Code, which the California Commission has the duty to enforce (and, indeed, has taken affirmative steps to make effective), by specifically providing that the United States may obtain such transportation only with the state's permission, contravenes this claim of right. The limitation on the right of the United States to contract arises automatically from the statute and is not dependent on Commission action. The conflicting claims, asserted by adverse parties, thus give rise to a controversy which admits of an immediate and definitive determination.

B. Exhaustion of administrative remedies is not required where the questions presented are not within the agency's authority to determine. Here, the question presented is the constitutionality of the act which the California Commission must administer; it is well settled that, in the absence of express statutory

authorization, an administrative agency has no power to determine the constitutionality of its enabling legislation. Nor was resort to the Commission necessary to an order to eliminate several alleged "doubts about local law" (App. Br. 57–58), since, however these doubts were resolved, the statute would still be a forbidden regulation of federal functions by state authorities.

C. The trial court properly exercised its equitable jurisdiction in view of the absence of other adequate remedies at law. Under the California law, the Government could not have obtained injunctive relief by suit in the California courts. And, to have petitioned for rehearing of the Commission's collateral cancellation order of the permit carrier exemption (see fn. 2, pp. 4–5, *supra*) and then applied for review of the Commission's order by the Supreme Court of California would, even if successful, have given only partial relief. Under that procedure, important areas of Government traffic would still be subject to the operation of Section 530. The United States could not obtain determination of the constitutional question by defending an action at law brought by the carrier to recover the published rate, since that rate, if within the zone of reasonableness, would be binding absent an agreement to transport at a lower rate. Moreover, the complaint alleged, and the evidence supported the district court's findings of, irreparable injury arising from impairment of the federal defense functions.

D. The Johnson Act, 28 U. S. C. 1342, did not prohibit a grant of the requested injunctive relief, since that Act does not apply to suits instituted by

the United States. In any event, the Act's prohibitions run against enjoining an "order" of a state administrative agency in specified circumstances; here, the Government's complaint attacked the state statute, not any "order" issued under it.

E. In large part, this case turns on an evaluation of the effect of a state statute on maintenance of the armed forces—a national issue which federal courts are uniquely equipped to decide. No interpretation of the statute or consideration of local law can fundamentally affect the resolution of this issue. The trial court thus clearly was not required by comity considerations to abstain from action pending state proceedings.

II

Apart from the constitutional immunity protecting federal functions from state interference, the application of Section 530 to United States defense shipments squarely conflicts with specific procurement regulations having the force of law. Defense Department, Army, Navy, and Air Force regulations direct the selection of transportation means by military officers without regard to state rate policies or rates, and specifically require the negotiation of rates below "applicable current rates" for commercial traffic where such negotiation is deemed appropriate by transportation personnel. In this direct conflict between national law and state law, the supremacy clause of Article VI of the Constitution requires that the state law must give way. *Miller* v. *Arkansas*, 352 U. S. 187.

III

As the law of federal immunity has developed since *McCulloch* v. *Maryland*, 4 Wheat. 316, this Court has held, both in the tax cases and with respect to other types of regulatory statutes, that nondiscriminatory taxation or regulation of Government contractors or agents is permissible so long as there is no substantial interference with the carrying out of the Federal functions. However, there has been no withdrawal from the original holding that it is beyond the power of the states to impose direct regulation or taxation on the Federal Government. It is also clear that, if the burden through indirect regulation interferes with the federal function, it, too, is unconstitutional.

Section 530 of the Public Utilities Code of California is unconstitutional in its application to the transportation of property for the United States because it constitutes a direct regulation of a federal activity. It makes it illegal for the United States to enter into special agreements with carriers to transport United States property. It is thus clearly distinguishable from the situation where the regulation is imposed upon contractors with the United States and the effect on the United States is only the indirect burden of additional cost. Here, California seeks to direct the nature of contracts to be made by the United States and seeks to impose criminal penalties on employees of the United States who violate the law. The case is thus different from *Penn Dairies* v. *Milk Control Commission*, 318 U. S. 261, which this Court found imposed the regulation only on the milk companies and left the United States free to buy at any

price it could. On the contrary, this case is closer to *Arizona* v. *California*, 283 U. S. 423, and *Johnson* v. *Maryland*, 254 U. S. 51, where the regulation was direct.

But even if the application of Section 530 could be considered to be indirect, it would still be unconstitutional because it places a substantial burden on a federal function. The doctrine that a nondiscriminatory regulation of a contractor with the United States is permissible, even though it causes an increased financial burden on the United States, does not permit the states to "interfere in any substantial way with the performance of federal functions" (*James* v. *Dravo Contracting Co.*, 302 U. S. 134). The court below correctly found that Section 530 does substantially hamper national defense (R. 237).

Under California's regulation, the "freight all kinds" (FAK) rate, under which a very substantial portion of the military traffic in California moves, would be unavailable (or at most, would be permitted only in "certain unusual circumstances" (R. 638–639)). Military shipping officers, in view of controlling military regulations, would therefore have to classify and segregate the hundreds of items involved in the movement according to published tariffs, and to rearrange the boxing or loading of the items. Further, whereas the Government's present bill of lading for the FAK movement contains only a brief generic description of the items involved for identification purposes at destination, it would be required, under California's regulation, to describe completely each item for classification and rating purposes. This

process of classification, segregation, and detailed description would interfere with the federal transportation function by delaying shipments and placing an additional work burden on shipping personnel. Clearly, a state is not empowered to deny to shipping officers of the United States choice of the most appropriate method of shipment.

Even if it be assumed that the California Commission would attempt to cooperate by giving favorable consideration to negotiated rates for government shipments, the procedures for getting approval would result either in delay in shipment or, if some provision for retroactive approval could be devised, in uncertainty which would make impossible the choice of the most appropriate method of handling a shipment.

The evidence showed that the imposition of state regulation would imperil the secrecy which is essential for many military shipments. The nature, quantity, and destination of many defense supplies is information which is closely guarded. At present, negotiations are carried on with a single representative of the carriers who has the highest security clearance. The material is sometimes shipped without identification and by circuitous routes. The California Commission could not pass upon the reasonableness of rates for such shipments without obtaining the secret information. Nor could this objection be met by a voluntary abstention of the Commission from the exercise of its authority on the receipt of a certificate that a shipment involved security matters. The requirement of the certificate from a federal of-

ficer is itself beyond the state's power. Moreover, it is unconstitutional to vest authority in the state commission to demand such information, whether or not it undertakes to exercise that authority.

ARGUMENT

Under Point I we shall discuss the various grounds urged by the appellant in support of its contention that the district court should have granted its motion to dismiss the complaint. Under Points II and III the Government urges that regulation by the appellant of the rates charged for transportation of property for the United States is unconstitutional because it is inconsistent with valid federal law and regulations and furthermore infringes the constitutional immunity of the United States to state regulation.

I

THE DISTRICT COURT PROPERLY ENTERTAINED THE COMPLAINT

A. THE LITIGATION IS A "CASE OF ACTUAL CONTROVERSY" WITHIN THE MEANING OF THE DECLARATORY JUDGMENT ACT

Appellant argues (Br. 39-41) that the Government's complaint does not describe an "actual controversy" within the meaning of the Declaratory Judgment Act (28 U. S. C. 2201). The Act authorizes a proceeding thereunder in "a case of actual controversy," and it applies only to controversies "which are such in the constitutional sense." *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 239–240; *Nashville, Chattanooga & St. L. Ry.* v. *Wallace*, 288 U. S. 249, 264. Such a controversy exists if there is "a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an

adversary proceeding upon the facts alleged." *Aetna Life Insurance Co.* v. *Haworth*, at 241.

That is this case. The United States asserts the constitutional right to obtain, free from state interference, intrastate transportation of its property pursuant to agreement with common carriers. The statute, which the Commission has the duty to enforce, provides that the United States may obtain such transportation only with the state's permission, and thereby contravenes this claim of right. These conflicting claims, asserted by adverse parties, give rise to a controversy which admits of an immediate and definitive determination of the legal rights of the litigants.

Appellant contends (Br. 40) that the complaint was defective because it failed to allege that the Commission had applied or was about to apply Section 530 to shipments made by the Government. Plainly no such allegation was necessary. Under the statute, it is unlawful for a common carrier to deviate from its filed tariffs (*supra*, p. 4). When Section 530 was amended so as to eliminate the permission previously conferred to carry property for the United States at reduced rates, the statute by its own force, and without further Commission action, made reduced rates for Government property unlawful. Appellant itself has stressed that the amendment to Section 530 "was self-executing in important areas of government traffic; that is to say, no further action whatever, by anyone, was necessary to subject to rates previously established for commercial shippers the traffic of all United States government agencies in certain

special commodities, and traffic of the civilian agencies in all commodities." App. Br. 44. In fact, sanctions became applicable both to the carriers and their agents and to the contracting officers of the shippers for disregard of the existing rates (California Public Utilities Code, Secs. 2107, 2110, 2112).[3]

Furthermore, the Commission had actually taken affirmative action to make Section 530 effective prior to the filing of the Government's complaint. While Section 530 became immediately applicable on its effective date (September 7, 1955), as a practical matter the section's application was seriously curtailed as long as transportation of the "general commodities" of the armed forces continued to be exempt from the minimum rates established by the Commission for permit carriers (see footnote 2, *supra*, pp. 4–5).[4] The Commission's cancellation of the exemption for permit carriers was specifically made to give

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[3] Sec. 2112 provides:

"Every person who, either individually, or acting as an officer, agent, or employee of a corporation other than a public utility, violates any provision of this part, or fails to comply with any part of any order, decision, rule, direction, demand, or requirement of the commission, or who procures, aids, or abets any public utility in such violation or non-compliance, in a case in which a penalty has not otherwise been provided for such person, is guilty of a misdemeanor, and is punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment."

[4] The exemption affected the rates common carriers might charge because Section 530, as amended, authorized them to transport property of the United States at reduced rates provided they were not lower than the rates "lawfully" chargeable by permit carriers (see *supra*, p. 2).

effect to the change in law caused by the amendment to Section 530 (R. 91), and this change in law was also the basis, after the Commission's first postponement of the cancellation date, for its refusal to grant a second postponement (R. 97, 101).

In short, under Section 530, as amended, the statute itself stood as a barrier to reduced rates for transportation of Government property and, if we look beyond the face of the statute, the Commission had taken specific action to implement the statutory barrier. Since the statute is in derogation of the right claimed by the Government, it gave rise to an actual controversy which is not dependent upon a showing of threatened enforcement. Cf. *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456. And the judgment which the district court entered could and will (unless judgment is reversed) end the controversy.[5]

Appellant's reliance (App. Br. 53) on *Public Service Commission of Utah* v. *Wycoff*, 344 U. S. 237, is misplaced. In that case a carrier sought a judgment in the federal district court declaring it to be engaged in interstate commerce, with the purpose of using that judgment as a defense in any suit the state commission might bring against it. This Court pointed out that no such suit had been brought, that even if the carrier were in interstate commerce, it could be subject to some degree of state control, and that it was therefore impossible to ascertain, outside

[5] The complaint properly named the Commission as respondent since it was the agency charged with carrying out the provisions of Section 530.

the context of an actual suit by the state commission, what controversy, if any, would develop between the parties. 344 U. S. at 244–246.

The instant case differs markedly from *Wycoff*. Here the Government is not seeking relief in order "*to guard against the possibility*" (*Wycoff*, at 244) that the Commission will assume jurisdiction over the rates charged for the transportation of its property. The statute itself limits transportation at reduced rates to the situation where there has been prior Commission approval, and the Commission's jurisdiction would be invoked only in seeking exercise of its discretionary authority to permit reduced rates which, without that authorization, are prohibited. The "concrete controversy" as to whether the Government has the constitutional right to obtain transportation service, free from state control over the charge therefor, and of whether Government agents may follow their instructions to negotiate contracts without state approval, is thus squarely presented.[6]

B. THE COMPLAINT WAS NOT BARRED BY REASON OF FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

At the time the Commission canceled its order authorizing permit carriers to transport certain Gov-

[6] For similar reasons, *Public Utilities Commission* v. *United Air Lines*, 346 U. S. 402, where the Court in a *per curiam* order, citing *Wycoff*, ordered dismissal of the suit, is inapposite. There the air carrier sought a judgment declaring the particular operation involved to be of an interstate nature and enjoining any possible regulation by the state commission of the operation. The record, however, showed that the state commission's regulatory proceedings were of an investigatory nature, and that the controversy between the parties had not yet developed to a concrete stage.

ernment property for the armed services without regard for the minimum rates applicable to transportation of property of private persons, the Defense Department (through the Navy Department) sought and obtained postponement of the date of cancellation. When a second request for postponement was denied, the United States initiated the instant suit. Appellant contends (Br. 55–57) that the Government could have requested rehearing of the cancellation order and could have sought certiorari review of an adverse Commission decision by the California Supreme Court, which review would embrace any question of constitutional violation, with right of appeal to this Court on a question of constitutionality. Appellant therefore alleges that the Government improperly failed to exhaust available administrative remedies (App. Br. 59).

But the question to be determined is whether the California statute contravenes the Federal Constitution in vesting in the Commission power to exercise control over rates charged for the transportation of Government property. To have raised this question before the Commission would have been to ask it to pass on the constitutionality of the very act which it administers. The statute does not expressly give the Commission this power, and it has been held that an administrative agency has no inherent power to determine the constitutionality of its enabling legislation. *Engineers Public Service Co.* v. *S. E. C.*, 138 F. 2d 936, 952–953 (C. A. D. C.); *Panitz* v. *District of Columbia*, 112 F. 2d 39 (C. A. D. C.).[7]

[7] See, also, *Central Nebraska Public Power & Irr. Dist.* v. *F. P. C.*, 160 F. 2d 782 (C. A. 8), certiorari denied, 332 U. S. 765;

Pursuit of administrative relief is not required where the only question presented as a basis for relief is not within the agency's authority. *Panitz* v. *District of Columbia, supra; Southern Blvd. R. Co.* v. *City of New York, infra; Buder* v. *First National Bank,* 16 F. 2d 990, 993 (C. A. 8). Appellant cites (Br. 59) *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U. S. 752, and *Allen* v. *Grand Central Aircraft Co.,* 347 U. S. 535, as cases where this Court required exhaustion of administrative remedies even though constitutional issues were involved. But both cases presented other issues whose administrative resolution might make it "possible that nothing will be left of appellant's [constitutional] claim" (331 U. S. at 772). The Court therefore concluded that it was all the more imperative not to anticipate the administrative decision. In the instant case, however, no administrative determination would eliminate the constitutional issue. As the appellant admits, the law is automatically effective without the necessity of administrative orders (*supra,* p. 16).

Appellant urges (Br. 57–58) that a proceeding before it, and subsequently the California Supreme Court, was needed in order to eliminate several

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Southern Blvd. R. Co. v. *City of New York,* 86 F. 2d 633 (C. A. 2), certiorari denied, 301 U. S. 703; Davis, *Administrative Remedies,* 19 F. R. D. 437, 451–455.

An administrative agency can, of course, consider the constitutional issue with respect to the applicability of legislation to particular facts. *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41; *Engineers Public Service S. Co.* v. *S. E. C.,* 138 F. 2d 936, 953 (C. A. D. C.).

"doubts about local law" on which the constitutionality of the statute may turn. But it is our position, as stated in our discussion of the merits, that even if each of these doubts is resolved in favor of the appellant, the statute would still significantly interfere with federal officers in the discharge of their duties and would still conflict with procedures established by Congress or by valid regulations, so that it would be unconstitutional in any event. It follows that it is unnecessary to obtain determination by the California courts of questions of state law not decisive of the constitutionality of the statutory provision here under attack.*

In *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456, 465, this Court said:

> "The Commission in this case has not yet done more than assert its jurisdiction over United's rates. It has not yet held a hearing upon the reasonableness of United's present rates;

*Cases involving statutes of Louisiana, Pennsylvania, and Texas which presented the same ultimate issue as the instant case were instituted in state courts, but in these cases it was necessary to determine whether the applicable statutory provisions applied to shipments of property of the United States, an explicit provision of the California statute. The Supreme Court of Louisiana held that its statute did so apply. *Kansas City Southern Ry. Co.* v. *Louisiana Public Service Commission*, 225 La. 399. In Texas a district court and the court of civil appeals reached the same conclusions concerning the Texas statute. *Railroad Commission of Texas* v. *United States*, 290 S. W. 2d 699, now pending on writ of error to Texas Supreme Court. The Pennsylvania Superior Court found the Pennsylvania statute applicable to Government shipments and upheld its constitutionality. *United States* v. *Pennsylvania Public Utilities Commission*, decided September 30, 1957, now pending on petition for review by the Pennsylvania Supreme Court.

> it has made no finding whether these rates are unlawful and whether new rates should be substituted; it has not entered upon an inquiry to determine what rates would be just and reasonable.

The Court, nevertheless, affirmed the award of injunctive relief because the State Commission's orders were "plainly invalid" and would result in "injury not assessable in money damages, not only to appellee but to the public interest" (317 U. S. at 468–469).[9]

C. THIS WAS A PROPER CASE FOR EXERCISE OF EQUITABLE JURISDICTION

The following discussion as to the availability of alternative legal remedies and irreparable injury is pertinent only to the question of whether injunctive relief was properly granted. Such matters are irrelevant to the propriety of granting declaratory relief. 28 U. S. C. 2201 (declaratory relief may be awarded "whether or not further relief is or could be sought"); Rule 57, Federal Rules of Civil Procedure; Borchard, *Declaratory Judgments*, 2d ed., 315–316, 340–342; 62 Harv. L. Rev. 787, 808. Since declaratory relief may be granted independently of any request for injunctive relief, it follows that, even were the appellant correct in its arguments as to alternative remedies and irreparable injury, the district court properly retained jurisdiction of the suit to rule on that portion of the complaint which sought a declaratory judgment as to the constitutionality of Section 530 (R. 1).

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[9] See also, *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218; *Allen* v. *Grand Central Aircraft Co.*, *supra*, at 540–541.

1. *No other adequate remedy*

Although the exercise of equitable jurisdiction to enjoin enforcement of a statute is not well founded if other adequate remedy at law is available (*Hillsborough* v. *Cromwell*, 326 U. S. 620, 622), legal remedies, to displace equity jurisdiction, must be "as complete, practical and efficient as [the remedy] which equity could afford" under the same circumstances. *Terrace* v. *Thompson*, 263 U. S. 197, 214; *Gormley* v. *Clark*, 134 U. S. 338, 349. In the instant case no adequate alternative remedy existed.

The Government could not have obtained injunctive relief by suit in the California courts. Section 526 of the California Code of Civil Procedure, Appendix, *infra*, p. 76, forbids an injunction "[t]o prevent the execution of a public statute by officers of the law for the public benefit", and the California Public Utilities Code (Sec. 1759, Appendix, *infra*, p. 76) forbids any state court, "except the Supreme Court to the extent specified in this article", from interfering with the Commission in the performanace of its official duties. Clearly, therefore, no direct suit in the state courts could have afforded the relief sought and obtained in the present suit—that is, a determination of the validity of the statute, with a stay of its operation during pendency of the suit.[10]

[10] Appellant suggests (Br. 55–57) that the Government could have obtained adequate relief by petitioning for rehearing of the Commission's order cancelling the exception for permit carriers (see fn. 2, pp. 4–5, *supra*), and then applying for review of the Commission's order by the Supreme Court of California (Pub. Util. Code, Sec. 1756). The suggested proceeding would not, however, provide an adequate remedy. Although the ex-

Appellant suggests (Br. 51) that the constitutional question could be determined through the medium of an action by a carrier against the United States in the Court of Claims or a district court to recover charges based upon its filed rates. This method of procedure is wholly illusory. The United States would be liable for the filed rates absent agreement to transport at lower rates, and no such agreement can be expected to be made following the amendment to Section 530 because to do so would subject the carrier to substantial penalties. (See Pub. Util. Code, Secs. 532, 2107.) [11]

Appellant also urges (Br. 72–73) that a California common carrier must transport property notwithstanding dispute as to the proper charges, and that the Government therefore could insist on shipment and, in defending an action at law to recover the published rate, set up as a defense the unconstitutionality of state control over the rate. But, as previously stated,

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emption for permit carriers was included in Section 530 by reference, nevertheless, even if the exemption were reinstated, its application would be limited to the armed services so that no relief would be provided for the other branches of the Government. Moreover, even as to the armed services, the exemption was not applicable to the transportation of such commodities as petroleum, fresh fruits and vegetables, and livestock (App. Br. 43). The appellant itself has stressed that Section 530 was effective before the exception for permit carriers was cancelled (App. Br. 44).

[11] In *Hughes Transportation, Inc.* v. *United States*, 121 F. Supp. 212 (Ct. Cl.), the carrier sued for the difference between the state's prescribed rates and the rates negotiated, but in that case apparently neither the Government nor the carrier was aware of the requirements of state law during the period in question. 121 F. Supp. at 216. In any event, the appellant may not rely on the decision in *Hughes* since the case has been reopened

the published rate, if within the zone of reasonableness, would be binding, absent agreement to transport at a lower rate. The fact that state law barred such agreement would be irrelevant.[12]

2. Irreparable Injury

With respect to the element of irreparable injury, as a prerequisite to the grant of injunctive relief,[13] the complaint alleged that the change in law effected by the amendment to Section 30 "would greatly impede the discharge by the United States of its constitutional powers and responsibilities" and would "expose to the public patterns of movement and

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on application of the United States and is now being held pending the outcome in this case.

[12] Appellant is also mistaken in the underlying premise of its argument. Neither Section 2169 of the California Civil Code (Appendix to App. Br. 39) nor any of the cases cited by Appellant (App. Br. 72) establish that a carrier must transport property tendered for shipment at below the state commission's minimum rates. The issues before the courts in the cited cases were wholly different from the instant issue; indeed, in *Corbett v. Atlantic Coast Line R. Co.*, 205 N. C. 85, 87, the court made clear that the carrier's duty to accept shipments applied to "freight duly tendered with proper freight charges under existing tariffs * * *."

[13] In addition to the attack on the sufficiency of the complaint, the appellant also makes the separate assertion that, at trial, the Government failed to prove that the enforcement of Section 530 would cause it irreparable injury so as to justify the issuance of an injunction (App. Br. 89-124). In presenting this argument, the appellant in large part ignores the fact that the district court made detailed findings related to this issue (R. 246-252). The court's ultimate conclusion was that a denial of relief "would hamper the national defense" (R. 237). Obviously, if these findings are supported by the evidence, there was ample ground for granting the relief, and it is equally plain from the court's statement of the evidence that its findings were amply supported.

traffic which * * * might jeopardize the security of the United States" (R. 4). It further alleged that the long established rate structure in California "will be completely disrupted" with "attendant confusion, delay and expense"; that the cost of transporting property for the United States "would be immeasurably increased from the very moment that the section was put into effect"; and that the United States could not be compensated by bond or otherwise for the resulting increased expense to it during the period in which the statute was in force (R. 8). On these allegations we submit that it was clearly not an abuse of discretion to view the complaint as setting forth grounds for grant of injunctive relief.

On the other hand, the appellant's claims of injury to the California intrastate carrier system are not based on the pleadings. The restraining order issued by the district court merely "maintained the *status quo* pending a determination on the merits. Moreover, at the trial, the appellant conceded that the California transportation system, including the trucking industry, is sound and in "reasonably good financial health"; and that trucking revenues reached an all-time high in the 1954–1955 fiscal year, which "has been one of freight rate stability" (R. 694). Nothing that the appellant now asserts indicates a change. On balance, the equities lie with the Government.

B. THE DOCTRINE OF PRIMARY JURISDICTION DID NOT REQUIRE REFERRAL OF THE CASE TO THE STATE COMMISSION

Appellant contends (Br. 60–61) that the complaint should not have been entertained because it raise

an issue within the primary jurisdiction of the Commission. Appellant bases its contention on the allegation of the complaint that the class rate under which the United States would have to ship in many situations is "unrealistically high" as compared with "the commodity rates negotiated by commercial concerns" for shipments of like density and volume (R. 4–5).

Assuming appellant's special competence to decide this question, the short answer is that determination of the Government's right to the relief it sought did not require resolution of the question, nor did the district court resolve it.[14] The question at issue was whether state control over rates to be charged for transportation of Government property constituted, in the circumstances existing in California, an unconstitutional interference with federal officers in the discharge of federal duties and functions. Obviously, this is not a question calling for exercise of the expertise of a state administrative agency. The question was fully within the competence of a three-judge federal district court. See *Stratton* v. *St. Louis S. W. Ry.*, 282 U. S. 10; *Panitz* v. *District of Columbia*, 112 F. 2d 39, 41–42 (C. A. D. C.); Moore, *Commentary on the U. S. Judicial Code*, p. 52.

E. THE JOHNSON ACT DID NOT PROHIBIT GRANT OF THE REQUESTED INJUNCTIVE RELIEF

Appellant contends (Br. 63–70) that the district court should not have awarded injunctive relief in

[14] It found that in many instances class rates would be 50% to 100% higher than the commercial rate for shipments of similar character (R. 217), a fact not disputed by appellant's rebuttal witnesses.

view of the Johnson Act (28 U. S. C. 1342, Appendix, *infra*, p. 63), which provides that under certain conditions district courts shall not enjoin the enforcement of rate orders issued by state agencies. But, under the settled rule of construction that "statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect" (*United States* v. *United Mine Workers*, 330 U. S. 258, 272; *Leiter Minerals, Inc.* v. *United States*, 352 U. S. 220, 224–225), the Act should be construed not to apply to suits instituted by the United States. There is no legislative history indicating a purpose to subject the United States to the limitations imposed by the Act. See *Kansas-Nebraska Nat. Gas Co.* v. *City of St. Edward, Neb.*, 135 F. Supp. 629, 640 (D. Neb.).

In any event, the prohibitions of the Johnson Act run against enjoining any "order" of a state administrative agency affecting rates chargeable by a public utility, where jurisdiction is based solely on diversity of citizenship or repugnance of "the order" to the Federal Constitution. Here, the Government's complaint attacked the state statute, not any "order" issued under it. It was the statute itself, as amended, which made it unlawful for a common carrier to transport property of the United States at rates less than those set forth in its filed tariffs. Action by the Commission to enforce the statute, whether a court proceeding to enjoin further violation or a proceeding to recover penalties for violation (Pub. Util. Code Secs. 2102, 2104), would not in any sense be an "order" of

the Commission "affecting rates chargeable by a public utility."

F. CONSIDERATIONS OF COMITY DID NOT REQUIRE THE DISTRICT COURT TO ABSTAIN FROM GRANTING INJUNCTIVE RELIEF

Appellant's concluding jurisdictional argument (Br. 75–83) is that the district court should have abstained from granting relief in order to preserve comity in the relationship of the Federal Government and the State of California. Although in certain circumstances federal courts should abstain from deciding cases which turn on questions of state law,[32] here there are present none of the special circumstances which properly impel abstention. The questions of state law and procedure have little or no bearing on the issue of constitutionality. While local factors are involved, the issue is whether they can be given precedence over national interests. The case turns on an evaluation of the effect of a state statute on maintenance and operation of our armed forces—a constitutional or national issue which federal courts are uniquely equipped to decide. Cf. *Johnson* v. *Maryland*, 254 U. S. 51; *Mayo* v. *United States*, 319 U. S. 441. In *Leiter Minerals, Inc.* v. *United States*, 352 U. S. 220, 225–226,

[32] Thus, federal courts should abstain where a state court's ruling on an uninterpreted state statute or an undecided question of state law might render decision of a constitutional question unnecessary (*Railroad Commission* v. *Pullman Co.*, 312 U. S. 496; *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450); or where the case involves a specialized aspect of a technical system of local law outside the normal competence of a federal court (*Burford* v. *Sun Oil Co.* 319 U. S. 315, 332); or where "predominantly local factors" are presented and the plaintiff itself had initiated a state proceeding but failed to exercise its statutory right of appeal (*Alabama Commission* v. *Southern Railroad Co.*, 341 U. S. 341, 348–349).

this Court said that the policy of preventing conflict between federal and state courts "is much more compelling when it is the litigation of private parties which threatens to draw the two judicial systems into conflict than when it is the United States which seeks a stay to prevent threatened irreparable injury to a national interest." While these views were expressed with reference to the application to the United States of a statute prohibiting a federal court from enjoining a proceeding in a state court except under the conditions specified in the statute, the Court's reasoning equally bears upon the analogous question of voluntary abstention by a federal court in a case involving a suit by the United States to enjoin the operation of a state statute.

In substance, appellant's argument is that federal courts should abstain in every instance of federal-state controversy. In *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456, 468–469, *supra*, this Court, after adverting to the usual rule that federal courts "should be wary of interrupting the proceedings of state administrative tribunals by use of the extraordinary writ of injunction," declared: "But this, too, is a rule of equity and not to be applied in blind disregard of fact."

II

THE CALIFORNIA STATUTE CANNOT BE APPLIED TO FEDERAL TRANSPORTATION PROCUREMENT BECAUSE IT IS INCONSISTENT WITH FEDERAL LAW REGULATING SUCH PROCUREMENT

Aside from the constitutional immunity protecting the Federal Government's activities, the application of Section 530 to United States shipments would

squarely conflict with specific federal regulations, validly promulgated under legislation governing procurement by the United States. It follows under the supremacy clause of Article VI of the Constitution that the state law must give way.[16]

A comprehensive scheme of procurement policies is found in 10 U. S. C. 2301–2314 (70A Stat. 127–133) App., *infra*, pp. 62–63 (a recodification, without any substantial change, of the Armed Services Procurement Act of 1947, 62 Stat. 21, formerly 41 U. S. C. 151–161), and the regulations promulgated under these provisions, as here pertinent (Department of Defense Regulations, 32 C. F. R., c. I (A) (1957); Army, Navy and Air Force Regulations on Transportation and Travel, App., *infra*, pp. 65–75). These regulations have the force of law. *Miller* v. *Arkansas*, 352 U. S. 187; *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 484; *Johnson* v. *Yellow Cab Co.*, 321 U. S. 383, 389–90.

The standards, with which federal officials are directed to comply, and the judgments they are expected to exercise are expressed in detail. The procurement provisions in Title 10 contemplate that the great majority of contracts for supplies and services will be placed through competitive bidding, but that in certain situations the public interest requires purchases to be made by negotiation. 10 U. S. C. 2304, App., *infra*, p. 63; see H. Rep. No. 109, 80th

[16] *Miller* v. *Arkansas*, 352 U. S. 187; *Franklin National Bank* v. *New York*, 347 U. S. 373; *Carson* v. *Roane-Anderson Co.*, 342 U. S. 232; see *Penn Dairies, Inc.* v. *Milk Control Commission*, *supra*, 271–278.

Cong., 1st Sess., p. 3; S. Rep. No. 571, 80th Cong., 1st Sess., p. 2. There are set forth 17 situations in which contracts may be negotiated without advertising, including, among others, where the public exigency will not allow delay (10 U. S. C. 2304 (a) (2)), where it is impractical to secure competition (10 U. S. C. 2304 (a) (10)), and where the services or supplies are such that the purchase or contract should not be publicly disclosed (10 U. S. C. 2304 (a) (12)). See App. *infra*, p. 62. It is pursuant to these provisions, and particularly 10 U. S. C. 2304 (a) (10), that the military officers have negotiated with the carriers for transportation of the armed forces property.[17]

The Department of Defense and the several departments comprising the Defense establishment have issued numerous regulations specifically implementing the statute as to procurement of transportation services.[18] These regulations reflect the determination that such services shall be obtained through negotiation, and, where appropriate in the opinion of the procurement officers, at rates lower than those which may be current for commercial traffic. Thus, Armed Services Procurement Regulation 1.306–10, App.,

[17] The Senate Report on the 1947 Act states that Section 2 (c) (10) (now Section 2304 (a) (10), "is intended to place the maximum responsibility for decisions as to when it is impracticable to secure competition in the hands of the agency concerned" (S. Rep. No. 571, 80th Cong., 1st Sess., p. 8).

[18] The Secretary of the Army is empowered, under 10 U. S. C. 3012 (g), App., *infra*, p. 63, to "prescribe regulations to carry out his functions, powers, and duties under this title." For similar provisions as to the heads of the other defense establishments, see 5 U. S. C. 22, 10 U. S. C. 6011, 8012 (f) App., *infra*, p. 63.

infra, p. 66, provides that procurements involving volume shipments "shall be referred * * * to the appropriate military traffic management office for a determination of the reasonableness of applicable current rates and, when appropriate, for negotiation of adjusted or modified rates." The preceding regulation 1.306–9, App. *infra*, p. 66, specifies that while "carriers are required by both Federal and State laws to charge all shippers equally for like services rendered", nevertheless "freight rates are often lower for the Government traffic" when it possesses more favorable transportation characteristics (greater volume, less likelihood of damage, heavier loading, etc.); and it requires rate information to be obtained from the appropriate military traffic management office. Army Regulation 55–142 (par. 2, a) dated April 19, 1956, App., *infra*, pp. 66–67, specifies that in the routing of domestic freight traffic, "[t]he least costly means of transportation will be selected which will meet military requirements and still be consistent with governing procurement regulations and transportation policies as expressed by Congress, contingent upon carrier ability to provide safe, adequate, and efficient transportation." See also, A. R. 55–105, par. 4 (a) (1), App., *infra*, p. 66. Navy regulations (Navy Shipping Guide, Part. I, art. 1800 (d) (3) (20), App., *infra*, p. 70) refer to the negotiation of "more equitable rates" when "applicable freight rates appear excessive". Finally, the pertinent Air Force regulation (AFM 75–1, par. 80501 (b), App., *infra*, pp. 73–74), implementing an explicit Department of Defense instruction (DOD 4520.3, February 2,

1956, App., *infra*, p. 75), provides for "negotiations for adjustments or modifications of commercial carriers' rates, charges or governing rules * * * after a determination has been made as to the unreasonableness * * * of effective rates, charges or rules * * *."[19]

There is thus a direct conflict between the amended California statute and these federal regulations. The regulations direct the selection of transportation means without regard to state rate policies or rates, since, as we shall show, *infra*, pp. 49–58, consideration of such policies or rates would result in substantial interference with the effective discharge of the military function; and, specifically, the regulations require the negotiation of rates below applicable current rates (which have presumably been established by the carrier before the appropriate regulatory body in connection with commercial traffic), where such negotiation is deemed appropriate by the military transportation personnel. California, however, has now attempted to impose its policies on federal transportation procurement, and to permit federal officers to negotiate rates below the "current applicable" ones only where its Commission sanctions such a reduced rate. In such a direct conflict between state law and the national transportation procurement policy established by valid federal regulations, the state law must give way. *Miller* v. *Arkansas*, *supra*. In that case, this Court compared certain

[19] There has recently been established a single agency, Military Traffic Management Agency (MTMA), to handle the traffic management functions of the three services (Department of Defense Directive No. 5160.14, May 1, 1956, 21 F. R. 4355). Presumably it will coordinate the regulation referred to.

Armed Services Procurement Regulations with the provisions of an Arkansas licensing law applicable to federal contractors, and, upon finding a conflict, held the state law inapplicable to the United States. The same holding is compelled by the instant conflict between state and federal regulations.[20]

Appellant argues (Br. 136–142) that the Armed Forces Procurement law is not antagonistic to state rate regulation, and, in fact, expressly contemplates such regulation. In support of this, appellant cites the Senate Report which, in analyzing the provision in Section 2304 (a) (10) for negotiation "when it is impracticable to secure competition", refers to fields "where prices are set by law or regulation" (S. Rep. No. 571, 80th Cong., 1st Sess., p. 8). But full examination of the legislative history undermines appellant's contention. The draft of the proposed bill which became the Armed Forces Procurement Act of 1947 was prepared by the Navy and War Departments, and contained the provision in question (Hearings on H. R. 1366, before a House Subcommittee of the Committee on Armed Services, 80th Cong., 1st Sess., v. 1, pp. 424–433). The comments of the Departments show that it was designed primarily to cover "such services as are the subject of lawful monopolies, *e. g.*, electric power" (*id.* at 429; see, also, pp. 453–454, 473–474, 528; House Report No. 109 on H. R. 1366, 80th Cong., 1st Sess., pp. 8–9). At the

[20] Again, the appellant's reliance on *Penn Dairies, Inc.* v. *Milk Control Commission*, *supra*, is without substance. The Army's regulations there involved were explicitly found to have left the question as to the applicability of state price legislation to the courts (318 U. S. at 276–78).

later Senate Hearings, the Department spokesman stated that the provision was intended to apply in three situations (Hearing on H. R. 1366 before the Senate Committee on Armed Services, 80th Cong., 1st Sess., p. 15):

> 1. Where the nature of the supply or service is such that only one person can furnish it, for example, a patented or secret article.
>
> 2. Where the price of the supply or service has been legally fixed.
>
> 3. Where the practical circumstances are such that it would be difficult to secure real competitive proposals by means of advertising for formal bids.
>
> [illustrations in stevedoring services, chartering of vessels, and ship repairs omitted].

The second situation undoubtedly had reference to federal price controls which had only recently been lifted. It certainly is unlikely that the defense establishments, in requesting authority to negotiate, were urging that they be subjected to any and all state regulations as to rates or charges, irrespective of their effects on the armed forces' functions.[21] And, specifically, nothing in the legislative history supports the contention that they were seeking to restrict their long established authority to negotiate for transportation services, free from state regulation with all its burdensome effects.[22] In the circumstances, such a

[21] In view of the exemption of the armed services from the rates for interstate transportation, provided by Section 22 of the Interstate Commerce Act (49 U. S. C. 22), it is inexplicable that they would have recommended restriction of intrastate transportation by state commissions.

[22] It had been held administratively since at least 1909 that State laws governing the rates to be charged by common car-

decision cannot be imputed to Congress. Cf. *Penn Dairies* v. *Milk Control Commission*, *supra*, at 275.

Appellant relies on the fact that certain Armed Forces Procurement Regulations (Section 3.210-2 (j); Section 16.501-1; 32 C. F. R. 3.210-2 (j), 16.501-1, Appendix to App. Br., pp. 22-25), in calling for negotiation of contracts as to specified utility services or stevedoring services, refer to the rates for such services being established by "law or regulation" or "regulated by a Federal, State, or other public regulatory body * * *." But such reference is in line with the legislative history previously detailed. The significant fact is that there is no similar reference in the several regulations dealing with the important area of transportation procurement. On the contrary, as we have shown, these regulations clearly look to

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riers do not apply when the contract of carriage is with the United States. See *Contracts for Transportation*, 15 Decisions of the Compt. of the Treasury 648.

The regulation as to utility services (16.501-1) provides that such services shall be procured without a written contract when the supplier's rates are regulated and the annual cost is estimated to be $2,400 or less. Where the estimated cost exceeds that figure, "procurement shall be in accordance with departmental procedures" (Sec. 16.501-2, 32 C. F. R. 16.501-2, Appendix to App. Br. 25); and under the broad powers vested in the procurement officers (App., *infra*, pp. 70-71), rates below those specified in commercial tariffs filed with the State regulatory agency may be, and at times are, negotiated. Indeed, even where the services are estimated to be less than $2,400, they are to be procured by a written contract whenever the "negotiation and execution of a contract is deemed to be advantageous to the Government" (Sec. 16.501-1 (a) (3)). But cf. A. F. R. 91-5, par. 12.

negotiation, where deemed appropriate, of rates below those set by the regulatory agencies. Similarly, appellant's reliance (Br. 146) on Department of Defense regulations authorizing its personnel to participate "in proceedings involving carriers before Federal and State regulatory bodies" is misplaced. These regulations deal with special situations[38] and cannot be construed as a general acceptance by the United States of state regulation of the rates charged for Government shipments.

Appellant also points out (Br. 134) that Congress, in repealing land-grant rates in the Act of September 18, 1940 (54 Stat. 954, 49 U. S. C. 65, App., *infra*, p. 65), imposed upon the United States the obligation to pay the "full applicable commercial rates" (subject to the exception in Section 22), and, in a proviso, exempted procurement officers from the advertising requirements of 41 U. S. C. 5 "when the services required can be procured from any common carrier lawfully operating in the territory where such services are to be performed." From this, appellant concludes that the statute manifests

[38] Army Regulation 55-27, App., *infra*, pp. 67-68, makes clear that appearances before State regulatory bodies are appropriate in connection with a carrier's request for new operational authority or to discontinue an existing operation. Cf. A. F. M. 75-1, pars. 80602(2)(b), 80603.

[39] Prior to 1940, the United States had enjoyed a 50% reduction in the rates assessed by land grant railroad for the transportation of persons and property for the United States. The 1940 Act continued that reduced rate as to the transportation of military property and personnel. In 1945, this exemption of the military from the 1940 Act was withdrawn (Act of December 12, 1945, 59 Stat. 606).

a clear "recognition of local rate regulation as a substitute for competitive bidding" (Br. 134). But 49 U. S. C. 65 applies only to common carriers subject to the Interstate Commerce Act, and thus, has no application to the present intrastate commerce question.[26] Even if it were pertinent, this provision does not recognize "local rate regulation as a substitute for competitive bidding." By its express terms, it is subject to the provisions of Section 22, which authorizes the transportation of United States property free or at reduced rates.[27] In the circumstances, the proviso cannot be construed as anything more than an authorization to negotiate for transportation services.

Finally, appellant refers (Br. 135–6) to the fact that Section 22 of the Interstate Commerce Act (49 U. S. C. 22) was reconsidered in the 84th and 85th Congress, the latter amending the section to require that reduced rate tenders or quotations be in writing

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[26] It should also be noted that Section 5 of Title 41, referred to in Section 65, is inapplicable to the procurement of supplies or services by the Armed Services. See 10 U. S. C. 2311.

[27] The legislative history of the 1945 amendment to Section 65, withdrawing the exemption as to military property and personnel, emphasizes the continuing applicability of Section 22. See S. Rep. No. 552 on H. R. 694, 79th Cong., 1st Sess., p. 3; H. Rep. No. 333 on H. R. 694, 79th Cong., 1st Sess., p. 2. And the bill's sponsor, Senator Wheeler, made the following statement (91 Cong. Rec. 9316):

"I am saying that in the future, even though this bill shall be enacted, * * * the executive branch of the Government can say to the railroads, 'We feel that, because of the amount of traffic we are shipping over the railroads, we should have a reduced rate.' They should negotiate with the railroads, if the bill is passed, for a proper rate, if they are not getting one. * * * This bill does not change in the slightest degree section 22 of the act. * * *"

and be filed with the Interstate Commerce Commission (Public Law 85–246, 85th Cong.; 71 Stat. 564). But this recent reconsideration of the policy embodied in Section 22 does not support appellant's position. For the significant fact is that Congress, after extensive hearings[28] and thorough reexamination of the problem, did *not* pass the bill (the so-called Hinshaw Bill, H. R. 525, 84th Cong.) which would have repealed the right of carriers to transport property of the United States free or at reduced rates. Instead, Congress decided to continue that right with only the minor amendment noted. We submit that this is a further indication of a national transportation purpose, and that California, absent affirmative Congressional authorization (*Mayo* v. *United States*, 319 U. S. 441, 448), "may not interfere with the carrying out of [that] national purpose." *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 103.

III

STATE CONTROL OVER THE RATES TO BE PAID FOR TRANSPORTATION OF PROPERTY FOR THE UNITED STATES UNCONSTITUTIONALLY REGULATES THE FEDERAL GOVERNMENT AND INTERFERES WITH FEDERAL FUNCTIONS, SPECIFICALLY NATIONAL DEFENSE

With respect to the constitutional immunity of the United States from state regulation, the appellant argues (Br. 124–131) that state regulation of the rates charged for transporting property for the Federal Government pursuant to Section 530 is constitutional

[28] See Hearings on H. R. 525 before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 84th Cong., 1st and 2d Sess.

because, even assuming that it will impose an increased economic burden on the Government, the holding of *Penn Dairies, Inc.* v. *Milk Control Commission*, 318 U. S. 261, is that nondiscriminatory state regulation which imposes such a burden is permissible. But California's regulation of these rates has effects which go beyond increased costs to the Government. It substantially interferes with the performance of federal transportation functions and directly regulates and limits the United States in providing for maintenance and support of its armed forces.

A. THE IMMUNITY OF THE UNITED STATES FROM STATE REGULATION ATTACHES TO THE EXTENT THAT STATE LAW ATTEMPTS DIRECTLY TO REGULATE THE UNITED STATES OR INDIRECTLY BURDENS THE PERFORMANCE OF ITS FUNCTIONS

This Court early recognized the constitutional immunity from state regulation of properties, functions, and instrumentalities of the Federal Government.[29] As an "unavoidable consequence of that supremacy which the constitution has declared" (*McCulloch* v. *Maryland*, 4 Wheat. 316, 436), this Court has consistently struck down state regulations which transgressed the Federal Government's immunity.[30] The immunity

[29] See *Osborn* v. *United States Bank*, 9 Wheat. 738; *Weston* v. *City Council of Charleston*, 2 Pet. 449; *Thomson* v. *Pacific Railroad*, 9 Wall. 579, 590–591.

[30] E. g., *Mayo* v. *United States*, 319 U. S. 441 (fertilizer distributed under federal program not subject to state inspection and stamp tax); *Arizona* v. *California*, 283 U. S. 423 (plans and specifications for federal dam not subject to approval of state engineer); *Hunt* v. *United States*, 278 U. S. 96 (federal agents in national forest and game preserve not restricted by state laws); *Johnson* v. *Maryland*, 254 U. S. 51 (driver of United States mail truck not subject to state licensing require-

is necessary "in order to maintain the essential freedom of government in performing its functions." *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149–150. It is fundamental that "[t]he United States may perform its functions without conforming to the police regulations of a State." *Arizona* v. *California*, 283 U. S. 423, 451.

Originally, the scope of intergovernmental immunity from taxation as well as regulation was very broad, on the theory that the power to tax involves the power to destroy. See *McCulloch* v. *Maryland*, 4 Wheat. 316, 431; *Osborn* v. *United States Bank*, 9 Wheat. 738, 867. The Federal Government's immunity from state taxation was then considered to extend to income, property or transactions of persons outside the Government who dealt with or acted for it. See cases cited in *United States* v. *Allegheny County*, 322 U. S. 174, n. 1, at 176–177. But more recent decisions have sharply curtailed the breadth of the tax immunities inherent in our federal system, and have, in accord with views expressed by the Government, permitted state taxation of government contractors, government employees, and government lessees.[31] This curtailment is based on the view that an indirect, nondiscriminatory economic burden does not interfere

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ments): *Ohio* v. *Thomas*, 173 U. S. 276 (federal soldiers' home not subject to state law requiring display of placard where oleomargarine is served); *United States* v. *Snyder*, 149 U. S. 210 (federal lien enforceable regardless of state recording and time limitations).

[31] E. g., *James* v. *Dravo Contracting Co.*, 302 U. S. 134; *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466; *Oklahoma Tax Commission* v. *Texas Co.*, 336 U. S. 342.

with the United States, but is merely "the normal incident" of the coexistence of two taxing authorities in a federal system.[32]

The Court, in reformulating the doctrine of intergovernmental tax immunity, has left intact the principle that the states cannot directly regulate the Federal Government[33] nor, even by indirection, "retard, impede, burden, or in any manner control" its operations (*McCulloch* v. *Maryland*, 4 Wheat. at 436). Those who contract with the Federal Government are not immune from state regulation if the impact upon the United States of this regulation is solely economic and is merely reflected in increased costs. This limitation on the doctrine of immunity was derived from the cases sustaining non-discriminatory state taxes on federal contractors. *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495 (privilege tax); *Smith* v. *Davis*, 323 U. S. 111 (property tax on open account); *Curry* v. *United States*, 314 U. S. 14 (use tax); *Alabama* v. *King & Boozer*, 314 U. S. 1 (sales tax); *James* v. *Dravo Contracting Co.*, 302 U. S. 134 (gross receipts tax). Thus, this Court sustained the application to federal contractors of a New York safety requirement for building construction (*Stewart & Co.* v. *Sadrakula*, 309 U. S. 94) and held that Pennsylvania's minimum prices for milk controlled sales to a United States Army camp (*Penn Dairies, Inc.* v.

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[32] *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. at 487; *Helvering* v. *Producers Corp.*, 303 U. S. 376, at 386–87; *James* v. *Dravo Contracting Co.*, 302 U. S. at 156–57, 160. See *Penn Dairies* v. *Milk Control Commission*, 318 U. S. at 270–71.

[33] See cases cited in footnote 30, *supra*, p. 42.

Milk Control Commission, 318 U. S. 261). In both these cases the tax precedents were found to govern because the regulation was found to be indirect and its sole impact on the United States was a possible increased economic burden. 309 U. S. at 104; 318 U. S. at 270.[39]

A clear pattern governing the federal-state relationship has emerged. State tax or regulatory statutes whose incidence is *directly* upon the United States, its property, or its officers are invalid. Compare *Alabama* v. *King & Boozer*, 314 U. S. 1, with *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110. The states may, however, impose economic burdens upon the United States *indirectly* through non-discriminatory taxation or regulation of federal contractors. But where the burden upon the United States is not solely economic but impairs or obstructs attainment of federal objectives, state regulation is forbidden. In the broadest terms, the Court has indicated that the Federal Government's dealings with independent contractors are immune from state laws which "interfere in any substantial way with the performance of federal

[39] The opinions in *Penn Dairies* and *Stewart* cite *Baltimore & Annapolis R. R. Co.* v. *Lichtenberg*, 176 Md. 383, appeal dismissed, 308 U. S. 525, which involved state licensing and safety requirements applied to a trucking company under contract with the United States. Appeal was dismissed for want of a substantial federal question, citing cases on the general validity of motor vehicle regulation, without regard to the instant immunity problem. 308 U. S. 525. In *Stewart*, where the Court followed *Baltimore & Annapolis*, it considered the latter case as involving safety provisions analogous to those in *Stewart* which imposed only an economic burden on the Government. 309 U. S. at 104.

functions" (*James* v. *Dravo Contracting Co.*, 302 U. S. at 157, 161), or "handicap efforts to carry out the plans of the United States" (*Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 104).

B. SECTION 530 OF THE CALIFORNIA PUBLIC UTILITIES CODE IS A DIRECT REGULATION OF THE PERFORMANCE BY THE FEDERAL GOVERNMENT OF ITS CONSTITUTIONAL FUNCTIONS

In applying the principles discussed above to this case, the first question is whether the impact of the California statute is direct or indirect. If it is direct, it is unconstitutional regardless of the extent of its effect on the Government's activities. It is our position that, both in terms and in practical application, Section 530 of the California Public Utilities Code directly regulates federal activity.

The contracts for transportation regulated are contracts between the United States and intrastate carriers; the law authorizes the Public Utilities Commission to impose conditions on such contracts and forbids them to be entered into for less than the established rates unless approved by the Commission. Thus the law forbids contracts by the United States which carry out federal policy in favor of contracts which carry out state policy. This the state may not do.

The distinction between this direct regulation and the situation in which the impact of the state law is indirect is well illustrated by a comparison of the factual situation here with that dealt with in *Baltimore & Annapolis R. R. Co.* v. *Lichtenberg*, 176 Md. 383, appeal dismissed, 308 U. S. 525, a case relied upon by

the appellant. There, the right of the state to require a certificate, pursuant to the enforcement of its highway safety regulations, from an independent contractor carrying passengers for the Federal Government was upheld. But the regulation was not on operations by the Government or its contracts, but only upon the carrier. Insofar as the requirement of the certificate affected transportation in any way, it affected the United States only through the effect of the requirement on the carriers. The operations or contracts of the United States were not involved. Similarly, in *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, the application of New York safety restrictions to a contractor for the Federal Government may have had an effect on the Government, but, if so, it was indirect and occurred only as a result of the application of the regulation to the contractor. Here, on the other hand, the very nature of the contracts to be drawn up and signed by the United States is sought to be dictated by the State of California.

The application of the statute to the United States is not a matter of construction for the state courts—by the explicit terms of Section 530 of the California Public Utilities Code it is applicable to the transportation of "property at reduced rates for the United States." The California legislature consciously and purposely amended its public utility laws to bring intrastate transportation by common carriers for the United States within the jurisdiction of its Commission (App. Br. 10–14).

Moreover, the enforcement provisions of the statute are by their terms applicable to the shipper as well

as the carrier. It is not only illegal for railroads and trucks to carry property at rates below those approved by the Commission; it is also illegal for the shipper to procure, aid or abet such noncompliance (Section 2112, California Public Utilities Code). As the district court pointed out (R. 235), under that section, a federal transportation officer can be sentenced to a year in the county jail for entering into such a contract. There are few applications of a regulation more direct than this.

The appellant seeks to escape from this argument by reference to *Penn Dairies* v. *Milk Control Commission*, 318 U. S. 261, which upheld the application of a state statute fixing minimum prices for milk to contracts with the United States (App. Br. 124–130). However, in that case the Court was careful to point out that the full impact of the law fell on the milk companies, not on the Government. Chief Justice Stone stated at page 270:

> Here the state regulation imposes no prohibition on the National government or its officers. They may purchase milk from whom and at what price they will, without incurring any penalty. See the opinion below, 148 Pa. Super. 270–271. As in the case of state taxation of the seller, the government is affected only as the state's regulation may increase the price which the government must pay for milk.

This is, of course, wholly inapplicable to this case where, as pointed out above, penalties for violation apply to the shipper as well as to the carrier. Moreover, the United States is not free in California to

contract with whomever it chooses at whatever prices it desires. All intrastate carriers are subject to the state Public Utilities Code so that the United States cannot find someone outside of California's jurisdiction to carry its property where the traffic is intrastate in nature. This differs from the milk case where it was possible for the United States to go outside the state to find a supplier.

On analysis, therefore, it appears that this case, rather than falling within the line of *Penn Dairies* and *Stewart and Co.* v. *Sadrakula*, is much closer to *Arizona* v. *California*, 283 U. S. 423, 451 (plans and specifications for federal dam not subject to approval of state engineer); *Johnson* v. *Maryland*, 254 U. S. 51 (United States employee driving mail truck not subject to state licensing requirements); and *Miller* v. *Arkansas*, 352 U. S. 187 (Government's standards for selecting contractors not subject to state regulation).

C. SECTION 530 OF THE CALIFORNIA PUBLIC UTILITIES CODE INTERFERES SO SUBSTANTIALLY WITH THE FEDERAL DEFENSE PROGRAM THAT IT IS UNCONSTITUTIONAL WHETHER THE IMPACT BE CONSIDERED DIRECT OR INDIRECT

Regardless of whether the application of the statute to federal activity be considered direct or indirect, it is nevertheless unconstitutional if it imposes a burden on the United States which is something more than increased costs. As previously noted, the trial court found that California's regulation of the intrastate transportation of property for the United States substantially interferes with the vitally im-

portant federal function of providing supplies for the armed forces.

1. First and foremost is the interference with the continued use of the "freight all kinds" (FAK) rate. Because of the nature of military operations and movements, it is frequently necessary and desirable to ship truckloads or carloads of hundreds of different items for supply of a unit or some military operation (R. 247, 452, 575). Indeed, in many instances, diverse items are grouped together in boxes or crates so as to facilitate their use under field conditions (R. 247, 563). The Government has met its peculiar transportation requirements in this field by the "freight all kinds" shipment: a single "average" rate, which will give the carrier a fair return, is negotiated for the entire truckload or carload[*] (R. 247, 462, 511).

California's restriction of this method of shipment would, we submit, seriously interfere with military transportation functions. For, with the elimination of a FAK rate, a shipment would come under the class rate structure and the entire shipment would bear the classification of the highest item in the mass of material being moved (R. 248).[**] The military

[*] A very substantial portion of the military traffic in California moves under FAK rates (R. 501, 575, 668).

[**] The PUC Minimum Rate Tariff No. 2 states that rates are "[g]overned, except as otherwise provided herein, by the Western Classification * * *"; and the latter (Western Classification 76, in Consolidated Freight Classification 21, Rule 10, Section 1) specifies that in a mixed carload, the consignor "will be charged at the straight carload rate (not mixed carload rate) applicable to the highest classed or rated article contained in the carload * * *."

officers would be required, under Defense regulations, to avoid such a costly means of transportation.[37] They would have to classify the hundreds and thousands of different items involved in the military movement, to segregate such items in accordance with published tariffs and classifications, and to rearrange the boxing or loading of such items so as to make the rail or truck shipment as economical as possible (R. 247–248, 449, 469–470).

This sorting out process would necessarily delay shipments,[38] and the required classification and segregation would place an additional work burden on shipping personnel (R. 248, 462–463; 449, 469–470, 513, 560–561). In short, elimination of the FAK rate

[37] The Armed Services Procurement provisions, 10 U. S. C. 2301, *et seq.*, generally speaking, look to Government procurement of services at the lowest cost possible. The regulations of the three Defense establishments specify the "lowest cost" standard in procuring transportation. Thus, Army Regulation 55–142, par. 2 (a), App., *infra*, p. 67, provides: "The least costly means of transportation will be selected which will meet military requirements and still be consistent with governing procurement regulations and transportation policies as expressed by Congress, contingent upon carrier ability to provide safe, adequate, and efficient transportation * * *." To the same effect, see Army Regulations 55–165, par. 1 (a) (1), App. *infra*, p. 66; Navy Shipping Guide, Part I, Art. 1800 (e) (4) (3), App. *infra*, pp. 70–71; Art. 1845 (2) (a) (1), App., *infra*, p. 71; Air Force Manual (AFM) 75–1, par. 30102 (a) 30107, App., *infra*, pp. 72–73.

[38] Some items, not urgently needed, might be stored until a sufficient quantity had been accumulated to make for an economical shipment (Armed Services Procurement Regulation 1.306–7, 32 C. F. R. 1.306–7; App., *infra*, p. 65; AFM 75–1, par. 30201, App., *infra*, p. 73); most frequently, after the classification and segregation, appropriate groups of items would go forward in less than truckload shipments (R. 447–448).

would not merely greatly increase Government transportation costs; it would, under the applicable regulations, handicap and slow down actual movement of military supplies and material. The urgency of such military programs as that currently involved in developing missiles will not stand such delay. We submit that a state is not empowered to deny to shipping officers of the United States choice of the most appropriate method of shipment.

The United States could not avoid this "sorting out" process by shipping diverse items in carloads and paying the class rate of the highest classified item. Controlling statutory and regulatory provisions, as well as a proper concern for economical conduct of the Government's business, foreclose this choice (R. 376, 608).

Elimination of FAK shipments would impose other burdens on Government transportation officers. The Government's bill of lading for such a shipment contains only a brief generic description of the items involved (*e. g.*, "bolts," "machinery") for identification purposes at destination (R. 533–534, 545, 764-777).[39] But under California regulation (PUC Minimum Rate Order No. 2), the Government would be required to describe completely each item for classification and rating purposes (R. 533–534, 545), with resulting

[39] Appellants argue (Br. 99–100) that the Government is required, under its standard bill of lading, to set out a complete description of the item. But the Government has not construed this requirement as applicable to FAK shipments, and Government transportation officers and employees testified that the simplified description is standard practice (R. 459–461, 467, 545).

additional expenditure of time and work effort (R. 449–450, 534). It was estimated, from a study of a representative FAK movement, that 13 additional man-hours would be required for a single shipment (R. 512–513, 533–534, 525–526, 548–549, 554).[40]

Appellant suggests (Br. 103) that under Commission regulation the Government will not be deprived of FAK rates "for all purposes." But neither the California Code nor the Commission's regulations make any provision for such shipments (R. 247), and appellant's Director of Transportation (R. 683), who gave testimony qualifying or disputing the testimony of Government witnesses as to the effect of the Commission's regulation,[41] significantly did not state that the Commission would authorize such shipments. Furthermore, the amendment to Section 530, and the Commission proceeding to bring transportation for Armed Forces of the United States under the minimum rates prescribed for permit carriers, were related to stopping or severely curbing FAK shipments. Appellant states (Br. 104) that the tes-

[40] Appellant (Br. 101) has cited three other time studies submitted by the Government as showing that the 13-hour example is atypical. But one of these studies involved only a few items already sufficiently described for classification (R. 550), and all were concerned only with classification, and apparently did not include the additional time needed to type out the complete description on the bill (R. 764–777).

[41] The Director testified that special commodity rates could expeditiously be established for the United States, that regulation of rates by the Commission would not cause delays in the movement of military traffic since the Commission could authorize rates for such traffic to be effective retroactively, and that as to traffic involving military security, he would recommend a general order exempting such traffic from regulation (R. 687–693).

timony of one of its witnesses makes it clear that "it was the serious abuse of FAK rates in California that led to the commencement of the proceeding before the Commission in 1954, and that it was the Government's desire to continue its enjoyment of these depressed rates that led to this litigation." The witness referred to testified that, while the FAK rate might be "proper to certain unusual circumstances", it is "obviously wrong", from a rate-making viewpoint and "has been abused in California" (R. 638–639). In view of the Appellant's stress that the Government's "use of FAK rates is a major evil" warranting Commission correction (App. Br. 122–123) it is clear that the California Commission would, if permitted, seriously curtail the use of these rates.

2. Frequently, military shipments between California points are of an urgent nature (R. 243, 443, 501, 533). At present, a rate similar to the commodity rate can be negotiated for urgent shipments in a matter of hours; or, if necessary, the shipment is made and the rate established retroactively (R. 247, 405–406, 597–598). But if negotiated rates are subject to Commission approval there could be material delays (R. 245–246). Thus, either shipment would be delayed until approval of the proposed commodity rate or it would be made at the much higher class rate and the United States, which has frequent need to make urgent shipments, would be discriminated against (R. 247).

Appellant's Director of Transportation testified that in his opinion the Commission could, under the Public Utilities Code, authorize retroactive rates

for Government traffic (See App. Br. 105). But assuming that appellant could, and in some instances would, approve retroactive rates, this would not solve the difficulties created by state control. It is the duty of Government transportation officers to secure the most economical method of transportation. Where a retroactive rate can be granted only with state approval, the transportation officer has no means of knowing at time of shipment whether any reduction will be approved and, if so, the amount of the approved reduction. Cost of transportation being, in these circumstances, an unknown quantity, the transportation officer is not in a position to decide whether "adequate and economical commercial transportation" is not available, thus justifying the use by the Army of its own vehicles (A. R. 57–5, para. 4 (1)), App. *infra*, p. 77, or, whether, where possible, to ship by an interstate route in order to avoid the higher charge payable for a more direct intrastate shipment (R. 386, 487).[42]

We submit that this kind of confusion and uncertainty, engendered by state regulation, is a serious interference with federal functions. This Court has said, although in a somewhat different context: "Procurement policies so settled under federal authority may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general

[42] One Government witness, Colonel Hall, testified (R. 157): "At Sharpe General Depot I am procuring officer, and I am subject to all the procurement regulations that every other procurement officer is. Mainly, I can't spend the taxpayers' money unless I know how much I am going to spend."

authority were subject to local controls." *United States* v. *Allegheny County*, 322 U. S. 174, 183.

3. Shipments of military items of a secret nature or to installations whose locations are secret are frequently made in California (R. 242, 499, 502, 514, 561). Under the Government's present system, the rate for such a shipment is negotiated with a single representative of the several carriers, who has the highest security clearance (R. 586–587, 599–602). No other person is informed of the nature of the item or the location of the secret installation (*ibid.*).[43] But if California were to assume jurisdiction over the rates for Government shipments, it would have to obtain information concerning the nature of the item, its origin and destination, and volume of the movement, in order to determine whether the rate in question was "just and reasonable" (R. 249). In the case of the secret item, the disclosure of such information to appellant would contravene applicable defense regulations[44] and might seriously jeop-

[43] Often the secret item is deliberately misdescribed in the bill of lading accompanying the shipment; and material moving to the secret location is routed in a circuitous way so that the ultimate destination is not revealed (R. 384, 416, 450–1).

[44] See e. g., A. R. 380–55, Military Security: Safeguarding Defense Information in Movement of Persons and Things, App., *infra*, p. 69; A. R. 380–5, Military Security, Safeguarding Defense Information, App., *infra*, pp. 68–69. These regulations, which have counterparts in the Navy and Air Force regulations, forbid the unauthorized disclosure of classified information concerning military movements, and limit access to such information "to those who require it and are appropriately cleared for access to it" (A. R. 380–55, par. 8 (b) (2); see R. 419).

dize the security of the United States (R. 249, , 561, 577).[45]

Recognizing "the necessity of preserving the na- nal security" (Br. 109), appellant's chief counsel pulated at the hearing below that he would advise Commission that it has the lawful authority "to thorize any carrier to negotiate with the United ates with complete freedom concerning the trans- rtation of any property of the United States which y involve security matters, provided only that the rrier require a certificate from a responsible fed- l officer, which certificate shall be filed with the mmission, that such transportation involves secu- y matters * * *" (R. 700–701). Assuming that pellant legally could and would promulgate such a ulation, this would not obviate state interference h federal functions.

We submit that a state has no power to require a ited States officer, who under valid Federal regula- ns determines that a particular Government ship- nt should move under secrecy procedures, to file a cer- cate with the state's agency as a condition to carry- out that determination. See *Miller* v. *Arkansas*,

[45] Appellant suggests (Br. 110) that the Government could umvent its regulation by use of its own vehicles or by leas- of vehicles from commercial carriers. The Government and does use its own vehicles for many secret shipments 418; A. R. 57-5, par. 4 (1)) but at times it does not have icient facilities to carry out the secret movement (R. 419). e critical fact here is that even in the most highly sensitive as, it has been the Government's practice for years to use mmercial vehicles with adequate security safeguards (R. 418-).

States and specifically prohibiting State regulation of intrastate services to the United States, there is no inherent conflict between State rate regulation of private intrastate carriage of property of the United States and the Constitutional powers and duties of the United States referred to by the District Court. Indeed, in the absence of a showing of necessity for any such legislation in relation to the Constitutional powers and duties of the United States the Tenth Amendment to the Constitution of the United States preserves the powers of the States in this respect. Compare *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144, 153-156 (1944).

This Court has long recognized that State regulation of motor carriers using State highways, even though involving a contract of carriage for the United States, does not interfere with the Constitutional powers and duties of the United States so as to present any substantial federal question. That was the basis for the decision of this Court in *United States* v. *Baltimore & Annapolis Railroad Co.*, 308 U.S. 525 (1939), dismissing the appeal of the United States, for want of a substantial federal question, from the decision below in *Baltimore & Annapolis Railroad Co.* v. *Lichtenberg*, 176 Md. 383, 4 A (2d) 734 (1939).

If there was ever any doubt of the State authority to regulate the minimum prices or rates for services or property contracted for by the United States, it was set at rest in favor of such authority by the decision of this Court in *Penn Dairies* v. *Milk Control Commission*, 318 U.S. 261 (1943). In that case the State Commission had prescribed the minimum price of milk to be sold to the Army within the State under contract with the United States. The United States urged that

such regulation making it unlawful to contract at a price below the prescribed minimum "violates the constitutional immunity of the United States and also conflicts with Federal legislation regulating purchases by the United States and therefore cannot constitutionally apply to such purchases." In an opinion which examined in detail the arguments of the United States this Court rejected both contentions.

There is no significance in the fact that the rate regulatory action in the *Penn Dairies* case involved the fixing of a minimum price for milk sold to the United States and here such rate regulatory action involves the fixing of a minimum rate for intrastate carrier service to the United States. Both the regulation of the minimum prices for milk and carrier service are based upon the police power of the States preserved to them by the Tenth Amendment to the Constitution of the United States. Although the Court below finds a Constitutional difference between procurement of milk for the Army and other items of property for Army use, nevertheless no such distinction was drawn by the District Court in enjoining State regulation of rates for intrastate carriage of *all* property of the United States.

In respect to furnishing transportation a carrier ordinarily bears to the United States the same relation that it does to a private person using its facilities. *St. Louis, B.&M.R. Co.* v. *United States*, 268 U.S. 169, 173 (1925). Carriers cannot, by private contracts with shippers, prevent or postpone the exertion by the State of the power to regulate the carrier's rates and practices. *Producers Transportation Co.* v. *Railroad Commission*, 251 U.S. 228, 232 (1920).

II.

No Federal Legislation Deprives the States of Authority to Regulate Intrastate Motor Carrier Rates for Service to the United States

None of the Federal statutes relied upon by the District Court show any intention of the Congress to deprive the States of their power or authority to regulate the intrastate rates or practices of motor carriers in rendering transportation service to the United States. On the contrary, if anything, they recognize such authority in the States. As pointed out above, this Court in the *Penn Dairies* case considered and rejected the argument of the United States that various Federal statutes of the time, relating to government purchasing and competitive bidding on government contracts, showed that Congress intended to supersede the normal price or rate regulatory functions of the States in connection with government contracts with private persons for goods or services. There has been no material change in Federal legislation in this respect since the decision in the *Penn Dairies* case.

The provisions of the Armed Services Procurement Act of 1947, as amended,* are not materially different from the similar statutory provisions considered by this Court in the *Penn Dairies* case (318 U.S. at pp. 271-273). As stated there such statutes "do not purport to set aside local price regulations or prohibit the States from taking punitive measures for violations of such regulations." "They are wholly consistent with the continued existence of such price regulations and

* Section 151 of Title 41, U.S.C., was repealed by the Act of Aug. 10, 1956, c. 1041, Section 53, 70 A. Stat. 641. Its provisions are now covered by Sections 2301, 2303-2305, Title 10, Armed Forces, U.S.C.

with acceptance by government officers of the regulated price where that is the lowest bid, or the omission of competitive bidding in circumstances where the local price regulations render it 'impracticable to secure competition' " (318 U.S. at p. 272-273). See also Senate Report No. 571, July 16, 1947 (to accompany H.R. 1366, 80th Cong., 2nd Session), 1948 U.S. Code Cong. Serv., pp. 1049-1050.

The provisions of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 471, 481(a)(4)), show on their face that Congress has recognized the authority of the State regulatory commissions over rates of carriers for transportation services to the United States. They do so by providing for representation before such State agencies by the Administrator. Neither such representation nor anything in that Act purports to supersede the authority of such State agencies in fixing rates of the carriers under their jurisdiction for services to the United States. Compare *Vinson* v. *Washington Gas Light Co.*, 321 U.S. 489, 497-499 (1944).

Section 22 of the Interstate Commerce Act (49 U.S.C. 22) is relied upon heavily by the District Court as showing a legislative intent by Congress that the United States is free to contract for procurement of transportation service for shipment of government property without regard to the rate regulatory authority of the States. Section 22 of the Interstate Commerce Act is made applicable to the Motor Carrier Act (Part II of the Interstate Commerce Act) by Section 217(b) thereof (49 U.S.C. 317 (b)). But Section 202(b) of the Motor Carrier Act clearly preserves "the exclusive exercise by each State of the power of regu-

lation of intrastate commerce by motor carriers on the highways thereof." (49 U.S.C. 302 (b)). See *Eichholz* v. *Public Service Commission*, 306 U.S. 268 (1939). The Interstate Commerce Commission is specifically prohibited by Section 216(e) of that Act from regulating rates "for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or any other purpose whatever" (49 U.S.C. 316 (e), *proviso*). Thus, so far as motor carrier transportation is concerned, the Federal law in positive terms recognizes the intrastate rate regulatory authority of the States. Section 22 of the Interstate Commerce Act is neither applicable to intrastate carrier transportation nor inconsistent with such recognition of State authority. See *Alabama Public Service Commission* v. *Southern R. Co.*, 341 U.S. 341, 345-346 (1951).

CONCLUSION

It is respectfully submitted that the States have power to regulate the minimum intrastate rates of motor carriers for the transportation of property of the United States between points within the State; and that the action and judgment of the District Court interferes with such power, is in error and in violation of the Tenth Amendment to the Constitution of the United States, and should be reversed.

Respectfully submitted,

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